LP Capital Construction Sdn Bhd v TKJ Builders Sdn Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24C-3/2 OF 2020
ZALEHA PANDIN JC
14 SEPTEMBER 2020

Civil Procedure — Proceedings — Multiplicity of proceedings — Whether claimant's filing of payment claim under Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') after having raised same as counterclaim in court proceedings was abuse of process — Whether there was multiplicity of proceedings — Whether claimant could seek relief under the CIPAA concurrently with court action or arbitration — Whether the CIPAA was designed to be activated any time there was valid payment claim under construction contract to resolve payment disputes speedily to prevent cash-flow problems in the industry — Whether party who had raised payment dispute in CIPAA proceedings was not precluded from raising same issue either at the same time or later in arbitration or court proceedings

The plaintiff sued the defendant in the High Court over disputes arising in a construction contract which the plaintiff had awarded the defendant. The defendant filed a defence and counterclaim concerning three payment claims under the contract, two of which were resolved. With regard to the remaining payment claim ('Claim No 8'), the defendant proceeded to file a payment claim under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The plaintiff objected that since the defendant had already raised the payment claim in its counterclaim, it could not raise the same subject-matter in the CIPAA proceedings. The plaintiff filed the instant originating summons ('OS') for a declaration that the defendant could not continue with the CIPAA proceedings and that all steps taken or decisions made in the CIPAA proceedings with respect to Claim No 8 were null and void. Alternatively, the plaintiff sought an order to stay the CIPAA proceedings pending the court's determination on claim No 8. The plaintiff's complaint was that it was an abuse of process to allow the CIPAA proceedings to continue side-by-side with the counterclaim as there was multiplicity of proceedings concerning the same subject matter. The plaintiff argued that although s 37(1) of the CIPAA allowed a dispute in respect of payment under a construction contract to be referred concurrently to adjudication, arbitration or the court, it was subject to s 37(2) where the phrase 'being adjudicated' meant that the dispute had to have been initiated by way of a CIPAA proceeding first before it could be referred to arbitration or to the court.

Held, dismissing the OS:

(1) Parliament's intention when enacting the CIPAA was mainly to facilitate regular and timely payment in respect of construction contracts and speedy dispute resolution via adjudication. It was to alleviate payment problems that would stifle cash-flow in the construction industry (see para 10).

(2) Adjudication under the CIPAA was never designed to conflict with arbitration and litigation and it could be activated at any time when there was a valid payment claim under a construction contract. Accordingly, the question of which should prevail over the other did not arise at all. Statutory adjudication did not require the agreement of parties to commence the process and it prevailed over any contractual agreements to the contrary between parties. Statutory adjudication stood alone from all other alternative modes of dispute resolution such as arbitration or litigation. The phrase 'being adjudicated' in s 37(2) of the CIPAA did not literally mean that there must be an existing adjudication before parties could turn to litigation (see paras 14–15).

(3) The CIPAA proceedings and the counterclaim in the High Court could exist concurrently. The situation did not amount to an abuse of process due to multiplicity of proceedings. The adjudication offered under the CIPAA was a simple, fast and cheap mechanism for resolving payment disputes faced by the construction industry as opposed to dispute resolution through arbitration or the courts. As arbitration and the court process were time-consuming and costly, adjudication was an additional option that could be concurrently invoked. CIPAA only dealt with payment and how to secure the payment. This did not stop the parties from arguing the issue of payment later or concurrently at a separate proceeding initiated in court or in arbitration. Section 37 of the CIPAA did not take away the vested rights of the parties (see para 19).

(4) Since the adjudication proceedings and the court proceedings could exist concurrently without there being any issue of multiplicity of proceedings, the plaintiff's prayer for a stay of the CIPAA proceedings pending the disposal of the suit in the High Court must also fail (see para 21).

[Bahasa Malaysia summary

Plaintif menyaman defendan di Mahkamah Tinggi terhadap pertikaian yang timbul dalam kontrak pembinaan yang telah diberikan oleh pihak plaintif kepada defendan. Defendan memfailkan pembelaan dan tuntutan balas berdasarkan tiga tuntutan pembayaran di bawah kontrak, dua di antaranya telah diselesaikan. Berkenaan dengan baki tuntutan pembayaran ('tuntutan No 8'), defendan secara terus memfailkan tuntutan bayaran di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Plaintif telah membuat bantah oleh kerana defendan telah membangkitkan tuntutan

bayaran dalam tuntutan balasnya, ia tidak boleh membangkitkan perkara yang sama dalam prosiding Akta. Plaintif memfailkan saman pemula semasa ('OS') untuk suatu deklarasi bahawa defendan tidak dapat meneruskan prosiding Akta dan bahawa kesemua langkah yang diambil atau keputusan yang dibuat dalam prosiding Akta berkenaan dengan tuntutan No 8 adalah terbatal dan tidak sah. Secara alternatif, plaintif memohon suatu perintah untuk penggantungan prosiding Akta sementara menunggu keputusan mahkamah terhadap tuntutan No 8. Aduan plaintif adalah bahawa ianya adalah suatu penyalahgunaan proses dalam membenarkan prosiding Akta diteruskan secara selari dengan tuntutan balas kerana terdapat prosiding berganda terhadap perkara yang sama. Plaintif berpendapat bahawa walaupun s 37(1) Akta membenarkan pertikaian berkenaan dengan pembayaran di bawah kontrak pembinaan dirujuk secara serentak kepada adjudikasi, timbang tara atau mahkamah, ianya berpandukan s 37(2) di mana frasa diadjudikasi' memberi erti bahwa sebarang pertikaian harus dimulai dengan proses Akta terlebih dahulu sebelum ianya dirujuk ke adjudikasi atau ke mahkamah.

Diputuskan, menolak OS:

(1) Hasrat Parlimen apabila menguatkuasakan Akta adalah secara utamanya untuk memudahkan pembayaran dalam kadar tetap dan tepat pada waktu bagi kontrak pembinaan dan penyelesaian pertikaian dengan cepat melalui adjudikasi. Ini untuk mengurangkan masalah pembayaran yang akan menghalang aliran tunai dalam industri pembinaan (lihat perenggan 10).

(2) Adjudikasi berdasarkan Akta tidak pernah direka untuk bertentangan dengan timbang tara dan litigasi dan ianya diaktifkan pada sebarang masa apabila terdapat tuntutan bayaran yang sah di bawah kontrak pembinaan. Oleh itu, persoalan yang mana dapat mengatasi yang lain tidak timbul sama sekali. Adjudikasi perundangan tidak memerlukan persetujuan pihak-pihak untuk memulakan proses tersebut dan ianya mengatasi sebarang perjanjian kontrak yang bertentangan antara pihak-pihak. Adjudikasi perundangan berdiri sendiri dari setiap kaedah penyelesaian pertikaian alternatif lain seperti timbang tara atau litigasi. Frasa 'diadjudikasi' dalam s 37(2) Akta tidak secara tersurat membawa maksud bahawa mestinya terdapat adjudikasi sedia ada sebelum pihak dapat beralih ke proses litigasi (lihat perenggan 14–15).

(3) Prosiding Akta dan tuntutan balas di Mahkamah Tinggi boleh wujud secara serentak. Situasi tersebut tidak terjumlah kepada penyalahgunaan proses disebabkan oleh prosiding berganda. Adjudikasi yang ditawarkan di bawah Akta adalah mekanisme mudah, cepat dan jimat dalam menyelesaikan pertikaian bayaran yang dihadapi oleh industri pembinaan berbanding dengan penyelesaian pertikaian melalui timbang tara atau mahkamah. Oleh kerana proses timbang tara dan mahkamah

memakan waktu dan berkos, adjudikasi merupakan pilihan tambahan yang boleh diguna pakai secara serentak. Akta hanya menguruskan pembayaran dan cara mendapatkan pembayaran. Ini tidak menghalang pihak-pihak untuk menghujahkan masalah pembayaran kelak atau secara serentak melalui proses berasingan yang dimulai di mahkamah atau dalam timbang tara. Seksyen 37 Akta tidak merampas hak-hak setiap pihak (lihat perenggan 19).

(4) Oleh kerana prosiding adjudikasi dan prosiding mahkamah boleh wujud serentak tanpa timbulnya isu prosidin berganda, permohonan plaintif untuk penggantungan prosiding Akta sementara menunggu pelupusan tuntutan di Mahkamah Tinggi juga seharusnya gagal (lihat perenggan 21).]

Cases referred to

Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors [2019] 6 MLRA 673, HC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd [2016] MLJU 1051; [2017] 1 MLRH 440, HC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496; [2018] 6 MLRA 210, CA (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224; [2019] 5 MLRA 584, FC (refd)
Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara [2000] 4 MLJ 167; [2000] 1 MLRA 1, CA (folld)
Uda Holdings Bhd v Bisaraya Construction Sdn Bhd & Anor and another case [2014] MLRHU 1096, HC (refd)

Legislation referred to

Construction Industry Payment And Adjudication Act 2012 ss 25(2), 35, 37, 37(1), (2)
Courts of Judicature Act 1964 ss 35, Schedule
Federal Constitution arts 121, 122
Interpretation Acts 1948 and 1967 s 40(1)
Legal Profession Act 1976
Rules of Court 2012 O 59 r 16(2), (4)
Building and Construction Industry Security of Payment Act [SG] s 34

Victor Ng (Tang & Partners) for the plaintiff.
Anthony Ngeh (Ngeh Ling Advocates) for the defendant.

Zaleha Pandin JC:

[1] This is an application under originating summons dated 28 February 2020 made by the plaintiff for the followings:

(a) a declaration that upon the true construction of s 37(1) read subject to s 37(2) of the Construction Industry Payment Adjudication Act 2012 ('CIPAA'), with a focus on the intentional legislative use of the phrase 'being adjudicated' in s 37(2) of the CIPAA, when a claimant has submitted to the jurisdiction of the High Court of Sabah and Sarawak first in time before the Institution of Statutory Adjudication Proceedings under the CIPAA, over the same subject matter of claim, then the legal right to concurrency of proceedings under s 37(1) Construction Industry Payment Adjudication Act 2012 is ousted and becomes unavailable;

(b) a consequential order from the preceding declaration that the subject Construction Industry Payment Adjudication Act 2012 Proceedings initiated from payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01), premised upon progress claim No 8 (alleged RM3,404,974.62), be declared to be null and void in law and all of the steps taken and/or decisions (if any) arising from the subject adjudication proceedings be null and void on account of the ouster of jurisdiction;

in the alternative

(c) a declaration that upon the true construction of s 37 of the Construction Industry Payment Adjudication Act 2012 read with s 25(2) Item 11 Schedule and/or s 35 of the Courts of Judicature Act 1964 and s 40(1) of the Interpretation Acts 1948 and 1967, the High Court of Sabah and Sarawak is vested with and not precluded to exercise its power and authority in law to order a stay of a Statutory Adjudication Proceedings under the Construction Industry Payment Adjudication Act 2012, filed after the same subject matter and dispute is already pending the before the High Court in Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC 2) on account of abuse of process by reason of manifest multiplicity of proceedings;

(d) a consequential order pursuant to Item 11 Schedule of the Courts of Judicature Act 1964 (s 25(2) and/or s 35) for the Construction Industry Payment Adjudication Act 2012 proceedings vis a vis payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01) premised upon progress claim No 8 (alleged RM3,404,974.62), be stayed pending the full and final determination of Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC 2) on account of abuse of process by reason of manifest multiplicity of proceedings;

(e) an interim stay of the Construction Industry Payment Adjudication Act 2012 proceedings vis a vis payment claim dated 29 January 2020 (Ref: TKJBSB/LPCC/2020/A01) premised upon progress claim No 8 (alleged RM3,404,974.62), pending the full and final determination of the above captioned originating summons;

(f) costs on indemnity basis pursuant to O 59 r 16(2), (4) of the Rules of Court 2012 on account of the manifest abuse of process by the defendant by reason of being the cause of the multiplicity of proceedings or costs on standard basis; and

(g) such other and/or further relief or relieves as this honourable court considers fit, just and necessary to grant.

[2] The grounds of the application are:

(a) the plaintiff awarded the execution and completion of works in connection with a Project called 'Projek Bekalan Air Luar Bandar (BALB) Mentong Merau/Mongkos, Bahagian Serian, Sarawak, Malaysia' to the defendant pursuant to a letter of award dated 12 February 2018 ('the subject project');

(b) on 6 January 2020, the defendant had submitted to the jurisdiction of the High Court of Sabah and Sarawak in Kuching vis a vis the filing of a counterclaim in Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC 2) to pursue and seek remedy over an alleged sum of RM3,404,974.62 in relation to progress claim No 8 under the subject project;

(c) on 29 January 2020, after having submitted to the jurisdiction of the High Court of Sabah and Sarawak vis a vis the filing of a counterclaim in Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC 2) to pursue and seek remedy over the alleged sum of RM3,404,974.62 in relation to progress claim No 8 under the subject project, the defendant served a payment claim over the same alleged sum of RM3,404,974.62 in relation to progress claim No 8 under the same subject project under a Statutory Tribunal vis Adjudication Proceedings under the Construction Industry Payment And Adjudication Act 2012 (Act 746);

(d) the High Court of Sabah and Sarawak is a Judicial Tribunal of unlimited jurisdiction in the Federation of Malaysia constituted and established under the Federal Constitution (arts 121 and 122) vis the enabling source in law, armed with powers conferred upon it by the quasi-constitutional statute vis Courts of Judicature Act 1964, including its additional powers under s 25(2) and s 35 of the Courts of Judicature Act 1964;

(e) whereas, the Adjudication Tribunal is a Statutory Tribunal with limited jurisdiction constituted and established under the Construction Industry Payment And Adjudication Act 2012 (Act 746);

(f) the principles in law relating to: (1) the avoidance of multiplicity of suits; and (2) notion that 'all issues ought to be tried by a single tribunal' expands into the realm of simultaneous proceedings instituted across judicial tribunals and statutory tribunals. Multiplicity of proceedings

amounts to an abuse of process and is underscored by the public interest to avoid embarrassment to the various tribunals that may undermine public confidence in the administration of justice in the larger scheme of the judicial system. Supervisory powers are embodied in the High Court over Statutory Tribunals to arrest and address abuse of process by the end users of the multiple tribunals;

(g) there is a glaring and patent multiplicity of proceedings given the defendant's counterclaim premised upon progress claim No 8 in the Kuching High Court Suit vis Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC 2) and also the payment claim premised upon the same progress claim No 8 instituted in the Statutory Adjudication Proceedings under the Construction Industry Payment And Adjudication Act 2012 (Act 746);

(h) given the glaring patent abuse of process, the plaintiff is entitled to seek the remedies prayed for to address the abuse of process occasioned and caused upon it solely by the defendant. The plaintiff takes the stand that:

(i) the right to concurrency of proceedings under s 37(1) of the Construction Industry Payment And Adjudication Act 2012 (Act 746) is not an unbridled prerogative. Section 37(1) is to be read subject to s 37(2). Therefore, s 37(1) of the Construction Industry Payment And Adjudication Act 2012 (Act 746)'s statutory right of concurrency is a bridled prerogative vis being subject to the issue of sequence of initiation of multiple-proceedings;

(ii) upon a close scrutiny of s 37(2) of the Construction Industry Payment And Adjudication Act 2012 (Act 746), the key phrase 'being adjudicated' bears meaning and was not legislated in vain. The phrase 'being adjudicated' means that the right to concurrency of proceedings presupposes that a Construction Industry Payment And Adjudication Act 2012 (Act 746) proceeding over the same subject matter of dispute had pre-existed before the same claimant resorts to arbitration or court to ventilate the same subject matter of dispute;

(iii) upon the true construction of s 37(1) read subject to s 37(2) of the Construction Industry Payment Adjudication Act 2012, with a focus on the intentional legislative use of the phrase 'being adjudicated' in s 37(2) of the Construction Industry Payment Adjudication Act 2012, when a claimant has submitted to the jurisdiction of the High Court first in time before the institution of Adjudication Proceedings under the Construction Industry Payment Adjudication Act 2012, over the same subject matter of claim, then the legal right to concurrency of proceedings under s

37(1) Construction Industry Payment Adjudication Act 2012 is ousted and becomes unavailable;

(iv) a consequential order is necessary from the preceding declaration that the subject Construction Industry Payment Adjudication Act 2012 Proceedings initiated from payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01), premised upon progress claim No 8 (alleged RM3,404,974.62), be declared to be null and void in law and all of the steps taken and/or decisions (if any) arising from the subject adjudication proceedings be null and void on account of the ouster of jurisdiction;

In the alternative;

(v) upon the true construction of s 37 of the Construction Industry Payment Adjudication Act 2012 read subject to s 25(2) Item 11 Schedule, s 35 all of the Courts of Judicature Act 1964 and s 40(1) of the Interpretation Acts 1948 and 1967, the High Court of Sabah and Sarawak is vested with and not precluded to exercise its power and authority in law to make all orders 'reasonably necessary', including an order of stay of Construction Industry Payment Adjudication Act 2012 proceedings filed after the same subject matter and dispute is already pending the before High Court Suit No KCH-22C-6/12 of 2019 (HC 2) on account of abuse of process by reason of manifest multiplicity of proceedings;

(vi) a consequential order pursuant to Item 11 Schedule Courts of Judicature Act 1964 (s 25(2) and/or s 35) for the Construction Industry Payment Adjudication Act 2012 proceedings vis a vis payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01) premised upon progress claim No 8 (alleged RM3,404,974.62), be stayed pending the full and final determination of High Court Suit No KCH-22C-6/12 of 2019 (HC 2) on account of abuse of process by reason of manifest multiplicity of proceedings.

(i) by necessity, the preservation of the integrity and utility of this originating summons requires the court's exercise of its just and unfettered discretion to grant an interim stay of the adjudication proceedings vis a vis payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01) premised upon progress claim No 8 (alleged RM3,404,974.62) pending the full and final determination of this application.

FACTUAL BACKGROUND

[3] In respect of prayer (e) above, the same has been dealt with and disposed off by the previous judge ie YA Dato Lee Heng Cheong whereby an interim

stay was grated on 4 March 2020 pending parties to submit and on 11 March 2020 during the Ruling, it was found by the court that adjudication under CIPAA was never intended to be in conflict with arbitration and litigation and so its procedure may be activated at any time when there is a valid payment claim under a construction contract. The defendant is not estopped from participating in adjudication under CIPAA, arbitration and litigation. The plaintiff's application for an interim stay to stop the defendant from exercising their statutory rights under CIPAA, is against the intent and purpose of CIPAA. In the light of this, the application for interim stay was dismissed on 11 March 2020 with costs of RM4,500 subject to payment of allocator. Having said that, prayer (e) is no longer relevant here.

[4] The plaintiff is a company incorporated in Malaysia under the Companies Act 1965 and has a registered office at No 39-3A-1, Jalan Metro Perdana Barat 1, Taman Usahawan Kepong, 52100 Kepong, Wilayah Persekutuan.

[5] The defendant is a company incorporated in Malaysia under the Companies Act 1965 and has a registered office at SL 23 & 24, 2nd Floor, Survey Lot 19702, Block B2, Saradise Kuching, Off Jalan Stutong, 93350 Kuching, Sarawak.

[6] The plaintiff awarded the execution and completion of works in connection with a project called 'Projek Bekalan Air Luar Bandar (BALB) Mentong Merau/Mongkos, Bahagian Serian, Sarawak, Malaysia' to the defendant pursuant to a Letter of Award dated 12 February 2018 ('the subject project');

[7] The plaintiff had initiated a suit against the defendant in High Court 2, Kuching on 12 December 2019 under Case No KCH-22C-6/12 of 2019 in which the defendant had filed its Defence and counterclaim to the same in relation to its payment claims Nos 6, 7 and 8. The first CIPAA proceedings for payment claims No 6 and 7 had been proceeded with and decided under adjudication on 28 January 2020. The second CIPAA proceeding for payment claim No 8 were only initiated by the defendant on 19 February 2020.

THE QUESTION OF LAW

[8] The question to be determined by the court in this OS are:

(a) what is the construction of s 37 of the CIPAA?

(b) whether the defendant is entitled to proceed with the second CIPAA proceedings after having submitted its claim to the High Court? and

(c) whether the court has power to order for a nullity or stay of adjudication under the second CIPAA proceedings?

THE PRAYERS/ISSUES IN RESPECT OF THE QUESTION OF LAW ABOVE

[9] A declaration that upon the true construction of s 37(1) read subject to s 37(2) of the Construction Industry Payment Adjudication Act 2012 ('the CIPAA'), with a focus on the intentional legislative use of the phrase 'being adjudicated' in s 37(2) of the CIPAA, when a claimant has submitted to the jurisdiction of the High Court of Sabah and Sarawak first in time before the institution of Statutory Adjudication Proceedings under CIPAA, over the same subject matter of claim, then the legal right to concurrency of proceedings under s 37(1) of the Construction Industry Payment Adjudication Act 2012 is ousted and becomes unavailable.

[10] In respect of the issue raised in issue No 1, it is pertinent to take in to account Parliament's intention when enacting CIPAA. It is mainly to facilitate regular and timely payment in respect of construction contracts and speedy dispute resolution via adjudication. It is to alleviate payment problems that will stifle cash flow in construction industry.

[11] It is noted the plaintiff did a comparison of CIPAA to s 34 of the Singapore's Building and Construction Industry Security of Payment Act (Chapter 30B) whereby s 34 uses the word 'notwithstanding' which does not restrict a party from applying for adjudication concurrently with its submission to court. Section 37 however uses 'being adjudicated' which shows that the adjudication under CIPAA must be on going or has been initiated before turning to litigation. The Learned Counsel for the plaintiff argued that the word 'being adjudicated' must be given its true and literal meaning. This is based on *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2019] 6 MLRA 673 which in gist provides that words that are clear should give effect to the plain words.

[12] Nevertheless, in *Uda Holdings Bhd v Bisaraya Construction Sdn Bhd & Anor and another case* [2014] MLRHU 1096 it was provided that the principles governing the application of the purposive approach of interpretation is that it must be understood first in accordance with its plain meaning. When in doubt of its plain meaning then court will start the process of construction by attempting to discover the broad purpose of legislation. Once the purpose is identified to do no violence to the plain reading, the courts will be prepared to adopt that reading but if the plain meaning would strain the reason it was enacted, then will the court look at its context in particular on the balance of clarity of the purpose identified and the degree of strain on the language.

[13] Applying the principles in *Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara* [2000] 4 MLJ 167; [2000] 1 MLRA 1, the court has refused to adopt the literal interpretation to the legislation involving Legal Profession Act 1976 for it would produce an absurd result. Gopal Sri Ram JCA (as he was then) had stated;

> [17] Now it is true that a literal interpretation of s 30(1)(c) would produce the meaning contended for by the appellant. But if you look at the decisions of our courts over the past few years, you will notice that we no longer resort to the literal rule when interpreting statues. We will not use it when if it does not advance the aim or object of a statute.

[14] This is in line with the principles in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2016] MLJU 1051; [2017] 1 MLRH 440 (HC); *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496; [2018] 6 MLRA 210 (CA); *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 5 MLRA 584 (FC). Adjudication under CIPAA was never designed to be in conflict with arbitration and litigation and it may be activated at *anytime* when there is a valid payment claim under a construction contract. Premised on that, the question of which should prevail over the other does not rise at all. Statutory adjudication does not require agreement of parties to commence the process and it prevails over any contractual agreements to the contrary between parties. Statutory adjudications stands alone and aloof of all other alternative modes of dispute resolution like arbitration or litigation. Therefore, the plaintiff's contention on this issue is clearly devoid of merits which run foul to the principle of law laid down in the case of *Martego*.

[15] Based in the above principles, the word 'being adjudicated' does not literally means that there must be an existing adjudication before parties can turn to litigation.

[16] A consequential order from the preceding declaration that the subject Construction Industry Payment Adjudication Act 2012 Proceedings initiated from payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01), premised upon progress claim No 8 (alleged RM3,404,974.62), be declared to be null and void in law and all of the steps taken and/or decisions (if any) arising from the subject adjudication proceedings be null and void on account of the ouster of jurisdiction.

[17] In my mind, because of the above position with regard to prayer/issue No 1 above, whereby adjudication and litigation can exist concurrently with each other and at anytime, the consequential order requested by the plaintiff to declare the second CIPAA proceedings to be null and void in law and all of the steps taken and/or decisions (if any) arising from the subject Adjudication

proceedings be null and void on account of the ouster of jurisdiction is therefore, not tenable. It follows, the plaintiff contention on this issue is baseless.

In the alternative

[18] A declaration that upon the true construction of s 37 of the Construction Industry Payment Adjudication Act 2012 read with s 25(2) Item 11 Schedule and/or s 35 of the Courts of Judicature Act 1964 and s 40(1) of the Interpretation Acts 1948 and 1967, the High Court of Sabah and Sarawak is vested with and not precluded to exercise its power and authority in law to order a stay of a Statutory Adjudication Proceedings under the Construction Industry Payment Adjudication Act 2012, filed after the same subject matter and dispute is already pending the before the High Court in Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC 2) on account of abuse of process by reason of manifest multiplicity of proceedings.

[19] It is not disputed that the said section above does confer power on the Courts as a final arbitrator to the dispute but the principles in the case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2016] MLJU 1051; [2017] 1 MLRH 440 (HC); *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496; [2018] 6 MLRA 210 (CA); *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 5 MLRA 584 (FC) shows that the second CIPAA proceedings and the suit in High Court 2 does not amount to an abuse process due to multiplicity of proceedings. They can exist concurrently and they do not flow on the same track with the first having only a temporary binding effect that serves the Parliament's intention when enacting the same ie the adjudication that is offered through CIPAA is a simple, fast and cheap mechanism for resolving payment problems or payment disputes faced by construction industry as opposed to the existing resolution through arbitration or the courts. As arbitration and courts are time consuming and costly, adjudication is an additional option that may be concurrently invoked. CIPAA only deals with payment and how to secure the payment. This however does not stop parties from arguing the issue of payment at a later point or taken concurrently at a separate proceeding imitated at court or arbitration. In short, s 37 CIPAA does not take away the vested rights of the parties (see *Uda Holdings Bhd v Bisaraya Construction Sdn Bhd & Anor and another case* [2014] MLRHU 1096).

[20] A consequential order pursuant to Item 11 Schedule Courts of Judicature Act 1964 (s 25(2) and/or s 35) for the Construction Industry Payment Adjudication Act 2012 proceedings vis a vis payment claim dated 29 January 2020 (Ref TKJBSB/LPCC/2020/A01) premised upon progress claim No 8 (alleged RM3,404,974.62), be stayed pending the full and final determination of Kuching High Court Suit No KCH-22C-6/12 of 2019 (HC

2) on account of abuse of process by reason of manifest multiplicity of proceedings.

[21] Similar to the reasoning above, this consequential order to stay the second CIPAA proceedings pending the disposal of the suit in High Court 2 due to multiplicity of proceedings must also fail as there is no duplicity of proceedings between an adjudication proceedings and court. It has to be reemphasized that those proceedings can exist in parallel and concurrently.

[22] The case of *Martego Sdn Bhd* further provides that statutory adjudication does not require agreement of parties to commence the process and it prevails over any contractual agreements to the contrary between parties. To reiterate, statutory adjudications stand alone and aloof of all other alternative modes of dispute resolution like arbitration or litigation.

CONCLUSION

[23] For all the reasons aforesaid, I dismiss the originating summons and cost of RM5,000 to the defendant.

OS dismissed.

Reported by Ashok Kumar